

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:PEN:PIT:TL-N-4674-00

MAYost

date:

to: Ron Loncharich, Case Manager
Audit - [REDACTED]

from: Associate District Counsel, Pennsylvania District, Pittsburgh

subject: Consent - Statute of Limitations - Form 8697

This is in response to your memorandum requesting our opinion concerning the statute of limitations with respect to interest assessable per Form 8697.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUE

Whether any special wording needs to be added to a general consent on Form 872 to reflect that it applies to look-back interest, in any, to be assessed for long-term contracts and/or Form 8697.

ADVICE GIVEN

Although wording indicating that the consent also covers interest assessable under I.R.C. § 460 or per Form 8697 would clarify the scope of the consent, such wording is not necessary for the efficacy of the consent or to protect the statute of limitation on assessment. Therefore, there is no need in the instant case to secure a new consent containing such language.

DISCUSSION

According to your memorandum, [REDACTED] has in excess of [REDACTED] separate contracts subject to I.R.C. § 460. When [REDACTED] filed its original return for the year under audit, it did not compute look-back interest under I.R.C. § 460, but is now in the process of doing so. At this time, the audit team does not know whether the look back interest will result in a refund or additional interest to be assessed.¹ Currently, the statute of limitations on assessment is protected by a general consent on an unmodified Form 872.

Under I.R.C. § 460(b)(1), look-back interest owed by a taxpayer is generally treated as income tax for purposes of subtitle F of the Code, which deals with administration and procedure. Moreover, in a recent Chief Counsel Advice, No. 200017038 (February 29, 2000), the position was taken that look-back interest under I.R.C. § 460 and the regular income tax are not separate and distinct items, but rather are components of the overall income tax liability of the taxpayer. Thus, it was concluded that the Form 8697, on which look-back is computed and reported, does not constitute a tax return itself, but is an attachment to the return.² It was further concluded that if a taxpayer files an income tax return without attaching the Form 8697, as was done here, the statute of limitations on assessing look-back interest begins to run upon the filing of the return.

Since additional look-back interest due from a taxpayer is treated as part of the overall income tax liability of that taxpayer, a Form 872 applicable to such liability also includes

¹ Of course, whether a taxpayer owes, or is owed, look-back interest for the tax year is determined on a net basis.

² This comports with the Instructions for Form 8697 where if additional interest is due, the Form 8697 is attached unsigned to the return and the amount due is entered as part of total tax on the return.

any look-back interest due. Accordingly, a general consent under Form 872 should protect the statute of limitations with respect to look-back interest to the same extent that it protects the statute for assessing the taxpayer's regular tax liability.

It should be noted, however, that look-back interest owed to the taxpayer is treated differently from look-back interest owed by the taxpayer. First, a Form 8697 claiming look-back interest owed to the taxpayer is not attached to the income tax return, but rather is signed by the taxpayer and filed separately with the Internal Revenue Center where the tax return is required to be filed. Second, look-back interest owed to the taxpayer is not treated as an overpayment of tax, because it is not interest that has been paid or collected from the taxpayer. Rather, a claim for additional look-back interest is a general non-tax claim, which is subject to a six-year statute of limitation under 28 U.S.C. §§ 2401 and 2501 for bringing suit against the Government. See Rev. Rul. 56-506, 1956-2 C.B. 959 concerning overpayment interest payable under I.R.C. § 6511. A cause of action for additional look-back interest would arise, triggering the six-year statute, when the Service schedules or allows look-back interest to the taxpayer. See, General Instrument Corp. v. United States, 98-1 USTC ¶ 50,234 (Cl. Ct. 1995) (Six-year statute under 28 U.S.C. §§ 2401 and 2501 begins to run when the Service schedules refund of lesser amount of statutory interest on an overpayment); Rev. Rul. 57-242, 1957-1 C.B. 452 (holding that a Form 843 does not protect the taxpayer's rights with respect to the overpayment interest under the non-tax statute of limitation.)

If you have any additional questions, please call Attorney Michael A. Yost, Jr. at 644-3441.

EDWARD F. PEDUZZI, JR.
Associate District Counsel